No. 82-1512

IN THE

Supreme Court of the United States

October Term, 1982

AAA LIQUORS, INC., *et al.*,
Petitioners,

v.

JOSEPH E. SEAGRAM & SONS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Question Presented

Is there any basis for granting review where both the district court and the court of appeals (1) found as a matter of fact that a wholesaler independently conceived the quantity discount or other discriminatory allowances favoring large volume retailers challenged by the small retailer-petitioners and (2) concluded as a matter of law that it was not vertical price-fixing in *per se* violation of §1 of the Sherman Act for the wholesaler's supplier to agree to reduce its prices to support such resale price discounts even though (a) the wholesaler could not otherwise afford to grant them and (b) it was understood that the wholesaler would use at least the amount of the saving realized from the supplier's price reduction to discount its resale prices?

Designation of Parties

The petitioners are identified in the caption appearing on the cover and at page one of the petition. The respondent's correct name is Joseph E. Seagram & Sons, Inc. It is the wholly owned subsidiary of The Seagram Company Ltd. and its only subsidiary not wholly owned or affiliate is G. H. Mumm & Cie.

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Opinions Below

The opinion of the court of appeals is unofficially reported at 1982-83 Trade Cases ¶65,075 and is printed as Appendix B to the petition. The opinion of the district court is not reported but is printed as Appendix A to the petition.

Statement of the Case

In this private treble damage antitrust case, tried without a jury, the petitioners, liquor retailers in the Denver, Colorado area, alleged vertical price-fixing in *per se* violation of Section 1 of the Sherman Act (15 U.S.C. §1). Their claims that the Seagram Distillers Company ("Seagram"), a sales division of the respondent, Joseph E. Seagram & Sons, Inc., conspired with Midwest Liquor and Wine Company ("Midwest"), the only wholesaler of Seagram products in the Denver metropolitan area, to fix resale prices and to discriminate in price between petitioners and certain large volume Denver retailers were rejected by both the trial court and court of appeals.

Denver is a volatile, highly competitive area. Discounts and special sales promotions are common merchandising techniques used by liquor wholesalers. All of the wholesalers, not just Midwest, constantly promote their competing brands with periodic programs (both discount and non-price programs) designed to advance or regain sales volume and market penetration. Discounts offered by the wholesalers typically vary with the quantity purchased by the retailer.

During the period covered by the evidence, Midwest established a variety of price discount programs for Seagram's "7 Crown" and "V.O." brands. The Midwest programs involved progressive quantity discounts and, in some instances, the largest discount was available only on quantities purchased by just a few large retailers. In addition, extra inducements of one or two dollars a case were offered

at different times only to several of the large Denver stores which engaged in weekend "loss leader" price advertising, featuring a few selected leading brands. Typically such advertising was confined to half-gallon sizes and offered the brands selected by the retailer at a special price, good only for the weekend, just a few pennies above the store's "laid-in cost" (*i.e.*, the price paid to the wholesaler, without any allocation of the operating or other costs incurred to run the store).

Midwest's programs were responsive to stagnating sales and declining market position experienced by "7 Crown" and "V.O." In addition, the Seagram brands were no longer featured regularly in the weekend "loss leader" advertising of the large retailers. Instead, the large stores continuously gave prominent space to the several brands of other suppliers which were most directly competitive with the Seagram brands. Those competing brands were advertised at prices more than a dollar below the prices at which the Seagram brands were placed on the store shelves without advertising.

In connection with the discount programs challenged by petitioners, with but one exception Midwest sought and obtained Seagram's agreement to reduce Seagram's price to Midwest by means of discounts or "depletion allowances" to be credited to Midwest for each case sold or "depleted" by Midwest pursuant to the specific terms of the program Midwest wanted to implement. It was understood between Seagram and Midwest that at least the full amount of each Seagram price reduction was to be used for the Midwest discount programs (in other words, Seagram's support was implicitly conditioned upon its being passed

on to Midwest's retailer customers, but Midwest was free to cover the cost of any part of its discounts not defrayed by Seagram's contribution). Without Seagram's support to offset, in whole or in part, the cost to Midwest of carrying out its programs, Midwest could not have afforded to offer the discounts it did.

The one exception to the pattern of support agreements outlined above occurred in 1975. In response to Midwest's view that "7 Crown" was losing sales and market position because it was not competitively priced, Seagram proposed a gross profit or margin guaranty to help Midwest bear the cost of reducing its resale prices. Regardless of what particular discount program or programs Midwest might adopt, Seagram agreed, across the board, simply to guarantee Midwest a gross profit or margin of 10.5 percent on the understanding that Midwest would attempt to make "7 Crown" more competitive by adjusting its resale prices as Midwest saw fit.

The dispositive fact defeating any claim of vertical price-fixing in *per se* violation of the Sherman Act was the finding by both courts below that Midwest had always maintained complete control over its resale pricing of Seagram's brands and had independently determined its own promotional pricing and discount programs even though it needed, sought and received financial support from Seagram to help defray the cost of such price reductions.[1] As the court of appeals concluded,

1. All of Midwest's list prices, discounts, discount levels and promotional programs for Seagram brands were established solely by Midwest based upon competitive conditions and its costs of doing business. Midwest personnel made all decisions in respect to its wholesale pricing and discount programs, including what programs would be run, when they would start, and when they would stop.

(footnote continued on next page)

"... The trial court found that Midwest, not Seagram, developed the challenged discounts and offered them to certain large volume liquor stores with the goal of increasing the market shares of 7 Crown and V.O. in Denver. [footnote omitted] Midwest then asked Seagram to reimburse Midwest the costs of the discounts, and Seagram agreed.

* * *

"... [The district court] found that although Seagram assisted Midwest financially, the wholesaler maintained complete control over the distribution and decision making concerning Seagram's products.

* * *

"... The record supports the trial court's conclusion that Midwest retained control over its prices and over the distribution of Seagram's brands." (Pet. 24, 25, 27[2])

Midwest did not need Seagram's authorization to run any particular program. Solely for the purpose of determining whether Seagram would agree to support the cost of such programs by reducing its prices to Midwest and, if so, in what amounts, Midwest presented to Seagram the program it had unilaterally determined to be competitively necessary. Seagram neither suggested, influenced or dictated what the amount or type of Midwest's discounts would be nor was it asked for approval of or agreement to those elements of the program conceived by Midwest.

2. Reference is to the pages of the petition.

Reasons for Denying the Writ

I

The Decision of the Court of Appeals That There Was No Vertical Price-Fixing in *Per Se* Violation of the Sherman Act Correctly Follows the Teachings of This Court and Is Not in Conflict With the Decisions of Any Other Court of Appeals.

A. The Cases Uniformly Hold That Because Midwest Independently Conceived Its Own Discount Programs and Retained Control of Its Resale Pricing, Seagram's Price Support Was Not Price-Fixing.

Both courts below recognized that under the decisions of this Court vertical price-fixing is a *per se* violation of the antitrust laws. Both of the lower courts also understood, however, that in all claims of vertical price-fixing—including those, unlike the case at bar, where the supplier has suggested, urged, persuaded or even argued as to the resale price he thinks best—the test is simply whether the wholesaler has been either induced to surrender voluntarily or coercively deprived of his right to exercise his own pricing judgment and set his own price as he ultimately sees fit.[3]

As the trial judge held, "vertical price-fixing is not established as long as the wholesaler remains free to determine his own prices, even when the supplier has suggested or even urged a similar pricing arrangement."

3. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707 (1944); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

(Pet. 18) The court of appeals correctly stated and applied the controlling principle:

> "... While we agree that resale price maintenance agreements are *per se* unlawful, all vertical arrangements affecting price do not constitute resale price maintenance agreements. 'The crux of any price fixing agreement is the relinquishment by a trader ... of the freedom to set prices in accordance with his own judgment.'" (Pet. 26)

The decisions of the courts of appeals uniformly articulate this same prerequisite to any finding of vertical price-fixing.[4] On the unequivocal record showing that Midwest independently conceived and determined its own resale prices and discounts without even a suggestion by Seagram,[5] therefore, the only tenable conclusion was that there had been no vertical price-fixing.

Both courts below also correctly rejected the contentions echoed here in the petition that Seagram was nevertheless guilty of vertical price-fixing because it was understood that Midwest was to reduce its prices by at least the amount of any support resulting from Seagram's agreement to reduce its prices[6] and because Midwest could not

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4. *See, e.g., Chisholm Brothers Farm Equipment Co.* v. *International Harvester Co.*, 498 F.2d 1137, 1142 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Adolph Coors Company* v. *FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974); *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

5. On this determinative factual finding, even apart from the two-court rule applicable here, as the court of appeals noted, petitioners did "not contest the trial court's finding that Midwest initiated the discount program and voluntarily sought Seagram's financial support." (Pet. 26)

6. As noted, however, Midwest was free to offer even larger discounts by absorbing the additional cost itself.

have afforded to bear the cost of the discounts it had determined were competitively necessary. Based as it is upon the fact that the discounted prices Seagram supported were those Midwest had independently decided it wanted to offer, this determination, too, is neither in conflict with the decisions of any other court of appeals nor contrary to any principles established by this Court.

It has been uniformly recognized that a supplier has the right to set his own price for the purpose and with the effect of influencing resale prices (including the price paid by the ultimate user or customer) even though the supplier's price decision patently affects the choice of resale prices available to his middlemen. Applying that principle to the facts of this case, a supplier may reduce his price for the purpose of enabling his dealers or distributors to market his product in more effective competition with the products of other suppliers as long as he does not dictate or require a specific resale price (or floor or ceiling) not of their free choice to which they must adhere.[7]

The cases also establish that a supplier's agreement to reduce his price, (1) even when conditioned upon the full amount of the saving thus realized by his dealer or distributor being passed on through corresponding decreases in their resale prices and (2) even though they could not otherwise bear the cost of such reductions, is not vertical

7. *See, e.g.*, *Butera* v. *Sun Oil Co., Inc.*, 496 F.2d 434, 438 (1st Cir. 1974); *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977); *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Sitkin Smelting & Refining Co.* v. *FMC Corp.*, 575 F.2d 440, 446 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978); *Overseas Motors, Inc.* v. *Import Motors Limited, Inc.*, 375 F. Supp. 499, 539 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

price-fixing and does not violate the Sherman Act as long as the resulting resale price is what the middleman chooses to charge in exercising his freedom to determine his own price.[8]

Attempting to create a conflict with the recent decision of the Seventh Circuit in *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), petitioners urge that here the court of appeals held that coercion is the *sine qua non* of vertical price-fixing. The court of appeals did not so hold. Even a quick reading of its decision demonstrates at every turn that the court was fully aware that the challenged arrangements between Seagram and Midwest were wholly volitional and that no coercion had been imposed.

In correctly stating the principle which controls this case ("The crux of any price-fixing agreement is the relinquishment by a trader . . . of the freedom to set prices in accordance with his own judgment"—Pet. 26), the court of appeals clearly recognized that if, contrary to the evidence,

8. *See, e.g., Sun Oil Co.* v. *FTC,* 294 F.2d 465 (5th Cir. 1961), *rev'd on other grounds,* 371 U.S. 505 (1963); *Sun Oil Co.* v. *Vickers Refining Co.,* 414 F.2d 383 (8th Cir. 1969); *Swettlen* v. *Wagoner Gas and Oil, Inc.,* 373 F. Supp. 1022 (W.D. Pa. 1974), *aff'd without opinion,* 511 F.2d 1395 (3d Cir. 1975); *Lehrman* v. *Gulf Oil Corp.,* 464 F.2d 26 (5th Cir.), *cert. denied,* 409 U.S. 1077 (1972). In *Lehrman,* Judge Wisdom stated:

> "The supplier has a legitimate interest in satisfying himself that . . . retailers of the supplier's own product are charging no *more* than the price they have represented as being competitively necessary and as requiring wholesale price support. . . . [The supplier] must ascertain the price actually charged by his own retailer after support is granted to insure that the dealer is not pocketing the price support instead of passing it on to consumers through lower retail prices which presumably would mean more effective retail price competition and increased demand reflected at the wholesale level." (*Id.* at 40) (Court's emphasis)

Midwest had relinquished its pricing judgment to Seagram by purely volitional, uncoerced agreement a *per se* violation would have occurred. The court dealt with the question of coercion only to the extent that it found Seagram's conduct to be free of any coercive overtones. Thus, based upon its agreement with the findings that Midwest had independently conceived its discount programs and retained control over its own prices, the court of appeals simply noted that in those circumstances "requiring Midwest to pass on the price break granted by Seagram does not by itself constitute the coercion or pressure to maintain resale prices condemned in the decisions finding *per se* violations." As the court stated, Midwest remained free to make even "greater reductions in price." (Pet. 27)

B. Because There Was No Vertical Price-Fixing, Any "Conspiracy to Discriminate" Between Midwest and Seagram Could Not Be a *Per Se* Violation of the Sherman Act.

This case was tried pursuant to a stipulation that petitioners were urging only *per se* violations of §1 of the Sherman Act. Before both courts below and again here, petitioners argue that a "conspiracy to discriminate"—an agreement between a wholesaler and supplier to discriminate in price or the result of which is price discrimination among customers of the wholesaler—is another form of vertical price-fixing and, therefore, a *per se* violation of §1.

Petitioners' "conspiracy to discriminate" claims do not meet the test for finding a *per se* price-fixing violation. The evidence and findings below defeat any contention that the prices at which Midwest resold the Seagram brands, whether or not discriminatory, constituted vertical price-

fixing within the meaning so clearly defined by the cases. Because there is no valid basis for treating Seagram's support of Midwest's independently conceived discount programs as vertical price-fixing, there is no predicate for treating those arrangements as *per se* violations of §1.

As this Court's decision in *Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), makes clear, vertical restriction agreements or arrangements other than resale price-fixing are to be evaluated by the rule-of-reason standard. Indeed, even under the Robinson-Patman Act, discriminatory prices are not a *per se* offense, and it is recognized that at least some price discrimination is procompetitive or neutral in its effect. To make price discrimination (whether unilateral or by concerted action) unlawful, even the liberal standards of that much-criticized "incipiency" statute require proof that the discrimination probably will lessen competition substantially or tend to create a monopoly.

Contrary to petitioners' argument (Pet. 12), this Court did not determine in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), that "discriminatory practices resulting from agreement . . . between independent merchants in a vertical relation" are *per se* violations, price-fixing or otherwise. In *Paramount*, the Court affirmed a finding of price-fixing conspiracies among movie producers and chain exhibitors to fix uniform minimum theatre prices. The Court also held that certain discriminatory non-price advantages which the theatre chains extracted by means of their combined buying power and which were designed to destroy or injure the independent theatres were shown on

the record there to be unreasonable restraints of trade based upon the rule of reason.

Similarly, the cases cited by petitioners do not support their assertion (Pet. 13) that the lower courts have recognized "agreements to discriminate in price as between competing customers to be a form of price-fixing and a *per se* violation of Section 1." To the contrary, those cases involved claims of conspiracy for the purpose of monopolizing or destroying a competitor or its ability to compete in a given market. In sum, Seagram knows of no case and believes there is none which holds or suggests that supplier price support, even though known to be for discriminatory discounts favoring large volume customers at the expense of smaller competitors, is a *per se* violation.[9]

Conclusion

This case presents no legal issue under the Sherman Act worthy of review. The decisions of the district court and the court of appeals that Seagram's price reductions to support the discount programs independently formulated by its wholesaler were not vertical price-fixing and not in

9. Notwithstanding the agreement between the parties that the case would be tried solely on *per se* theories, both courts below also evaluated the evidence by applying the rule-of-reason standard. Because the record was clear that the purpose of the challenged arrangements was to increase the sales of the Seagram brands vis-a-vis the major competing brands and not to hurt the small retailers' ability to compete with the large volume stores and because the only effect shown was the lowering of retail prices to consumers and the enhancement of interbrand competition, both courts concluded that no unreasonable restraint of trade had been shown. (Pet. 19-20, 29)

per se violation of the Act pose no conflict among the circuits or with the controlling decisions of this Court. The writ should be denied.

Respectfully submitted,

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